Internal Revenue Service

memorandum

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CC:TL:TS/MKEYES

date: **15 JUN 1988**

to: District Counsel, Helena MW:HEL
Attn: Tom Ritter, Attorney

from: Director, Tax Litigation Division CC:TL

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subject: [redacted]
Certification of Issue to State Supreme Court

This memorandum is in response to your request for technical advice regarding whether the Tax Court can certify an issue to a state supreme court.

Issues

1. Does Rule 44 of the Montana Rules of Appellate Procedure permit certification of issues to the state supreme court by the Tax Court?

2. Under what procedures can the Tax Court certify an issue?

3. As a matter of policy, should certification be used or encouraged?

Conclusion

We believe that Rule 44 of Montana Rules of Appellate Procedure is applicable to the Tax Court as a "United States Court". However, this issue should not be certified as it does not meet the other requirements for certification: the issue is not dispositive of the federal litigation and Montana law is not unclear on the point. This is a matter of statutory construction. There is ample Montana case law on statutory construction.

The Tax Court should be able to certify an issue under Tax Court Rule 1, if the state Supreme Court has a procedure applicable to it.

We do not favor certification for policy reasons, even though the option is not available under most state procedures. Although many areas of tax law are affected by state law issues,

due to the requirements placed on eligibility for certification, it is unlikely that many issues could be certified or need to be certified.

Facts

Respondent filed a motion for summary judgment arguing that the transfer of property to a shelter promoter by county commissioners was in violation of specific state statutes governing the transfer of county property. Since this transfer was illegal under state law, it is void, and there was no sale. Therefore, petitioners cannot take ITC and depreciation deductions for the property as they could not acquire the benefits and burdens of ownership.

On [redacted], [redacted] County commissioners transferred ownership of a special improvement district [redacted] facility to [redacted] for no consideration. The [redacted] facility was constructed by county bonds.

On [redacted], [redacted], agreed to purchase from [redacted] the [redacted] for $[redacted] with $[redacted] down and the balance due in installments.

[redacted] (petitioner) purchased from [redacted], on [redacted], this same [redacted] for $[redacted], payable in notes. [redacted] then leased the [redacted] to [redacted]. Lease payments varied over the term of the [redacted] year lease. The lease was a "net net lease". [redacted] claimed depreciation and I.T.C. on the [redacted].

Statutory authority for the acquisition, transfer, and management of property and buildings is governed by Chapter 8 of Title 7 of the Montana Code. In particular, M.C.A. Sections 7-8-2211 through 7-8-2214 specify the procedures required to be followed by a county desiring to sell and exchange county property.

> 7-8-2211. Authorization to sell and exchange county property. (1) Boards of county commissioners of this state have the power to sell, trade, or exchange any real or personal property, however acquired, belonging to the county business or the preservation of its property.
>
> (2) Whenever a country purchases equipment as provided in 7-5-2301 through 7-5-2308 [requiring competitive bidding], county equipment which is not necessary to the conduct of the county business may be traded in as part of the

purchase price after appraisal as provided in 7-8-2214 or may be sold at public auction as provided in 7-8-2212, in the discretion of the board.

(3) Any sale, trade, or exchange of real or personal property shall be accomplished under the provisions of Title 7, and in an exchange of real property the properties shall be appraised and no exchange of county property may be made unless property received in exchange therefor shall be of an equivalent value. In the event the properties are not of equivalent values, the exchange may be completed if a cash payment is made in addition to the delivery of title for property having the lesser cash value.

7-8-2212. Notice of sale and public auction required for certain sales. Unless otherwise provided, if the real or personal property sought to be sold is reasonably of a value in excess of $2,500, the sale shall be at public auction at the courthouse door after the previous notice given by the publication in a newspaper published in said county. The notice shall be published once a week for 4 successive weeks and posted in five public places in the county.

7-8-2213. Terms of sale. (1) The sale shall be for cash or such terms as the board of county commissioners may approve provided at least 20% of the purchase price shall be paid in cash. All deferred payments on the purchase price of any property sold shall bear interest at the rate of 6% per annum, payable annually, and may be extended over a period of not more than 5 years.

(2) No sale shall be made at public auction or to any school district without public auction for less than 90% of the appraised value.

(3) No title to any property sold under the provisions of 7-8-2211 through 7-8-2220 shall pass from the county until the purchaser or his assigns shall have paid the full amount of the purchase price therefor into the county treasury for use and benefit of the county.

7-8-2214. Appraisal required for certain sales. Unless otherwise provided:

(1) in all sales of property of a value in excess of $2,500, there must, before any sale, be an appraisal thereof by the board and at a price representing fair market value of such property. Such appraised value shall be stated in the notice of sale.

(2) no sale shall be made at public auction or to any school district without public auction of any property unless it has been appraised within 3 months prior to the date of sale.

Chapter 12 of Title 7 of the Montana Code governs rural improvement districts. The chapter provides the statutory framework for the creation, improvement, maintenance, district taxation, and the issuance and redemption of bonds by the district. In 1983, the Montana legislature passed Montana Code section 7-12-2127 which reads as follows:

> 7-12-2127. Transfer of operation, control, and ownership of improvement district facilities to a utility. Whenever a special improvement district has been created in accordance with the provisions of this part for the purpose of providing the facilities through which a regulated utility is to provide utility services to the district, the commissioners may, upon such terms and conditions as may be agreed to, transfer the operation, control, and ownership of the facilities to the regulated utility for the use by the utility to provide utility services.

It is our position that section 7-8-2201 et seq controls the transfer of county property. Petitioners contend that those sections are general and that section 7-12-2217 controls the transfer of the subject property. The question of certification of the issue to Montana Supreme Court was raised by petitioners' counsel during a conference call with Judge [redacted].

Discussion

I. To determine if Rule 44 of the Montana Rules of Appellate Procedure permits certification by the Tax Court, in this case or any case, there are three subissues that must be addressed. First, is the Tax Court a "United States Court" within the meaning of Rule 44? Second, is the issue to be certified dispositive of the federal litigation? Finally, is state law on the issue to be certified ambigous or unclear so as to require the state supreme court's opinion?

Rule 44 provides in relevant part:

> (a) Power to answer. Whenever in an action pending in a United States Court it shall appear that there is a controlling question of Montana law as to which there is a substantial ground for difference of opinion, a judge of the United States Court wherein the action is pending may certify that the question upon which adjudication is sought is

> controlling in federal litigation and the adjudication by the supreme court of Montana will materially advance the ultimate termination of the federal litigation. Rendition of an answer by the supreme court of Montana to any such question of law certified to it is discretionary with the supreme court of Montana, and it may refuse to render an answer if it appears that there is another ground for determination of the case pending in the United States Court, or if the question for adjudication is not clearly defined, or if the question is not adequately briefed or argued.

To determine if Rule 44 applies to the Tax Court, it must be determined if the Tax Court is a "United States Court" within the meaning of Rule 44. There is no definitional section in the Rules of Appellate procedure defining the term "United States Court." Nor does the term appear to be defined anywhere in the Montana Code. Although it would logically seem that the Tax Court is a "United States Court" since its title is United States Tax Court and it is not a foreign court, the answer may not be so simple. The term "United States Court" may be a term of art used by Montana to define article III courts. Title 28 U.S.C. section 451, which is the definitional section applicable to judiciary, excludes the Tax Court as a "court of the United States." The term "court of the United States" is defined in section 451 as follows:

> "Court of the United States" includes the Supreme Court of the Untied States, court of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by an act of Congress the judges of which are entitled to hold office during good behavior.

The Tax Court was established under article I of the Constitution as a court of record. The judges serve fifteen year terms and may be reappointed. See I.R.C. § 7443. In Sharon v. Commissioner, 66 T.C. 515, 533-34 (1976), aff'd, 591 F.2d 1273 (9th Cir. 1978), this Court held that the Tax Court is not a "court of the United States" as described in 28 U.S.C. § 1920. The Court in Sharon based its holding on 28 U.S.C. § 451. Although it is a constitutional court, the Court in Sharon noted that the United States Tax Court was consciously excluded by Congress from the definition of a "court of the United States under 28 U.S.C. § 451. See S. Rep. No. 1559, to accompany H.R.3214, 80th Cong., 2d Sess. 2 (1948). In the report, the Judiciary Committee recommended that all Tax Court provisions be

omitted from the bill, which originally sought to include the Tax Court within the statutory framework of Title 28, U.S.C., the Judicial Code, rather than within Title 26. See also McQuiston v. Commissioner, 78 T.C. 807 (1982), aff'd, 711 F.2d 1064 (9th Cir. 1983).

The definition under 28 U.S.C. § 451 is applicable to article III courts and not article I courts. Bowen v. Commissioner, 706 F.2d 1087 (11th Cir. 1983). The bankruptcy court is also excluded from the definition enumerated in 28 U.S.C. § 451, nor do its judges hold office during good behavior. See In the Matter of Lyle DeWayne, 52 B.R. 527 (B.C. W.D. Mo. 1985). In United States v. George, 625 F.2d 1081 (3d Cir. 1980), the Third Circuit held that a territorial court is not a "court of the United States." The district court of the Virgin Islands was not created under article III, section I, nor do the judges hold office during good behavior.

Although it is not clear what Montana means by "United States Court", it is apparent that the Tax Court is not a "court of the United States" as it is defined in Title 28. It may be helpful to look at other states' certification procedures to see if any guidance can be ascertained as to whether Montana's certification procedure applies to the Tax Court.

Most states have adopted a procedure for certification which follows the Uniform Certification of Questions Law Act. Every state that provides for certification allows questions from the United States Supreme Court or from a federal Court of Appeals. 1/ Of the 35 states that have adopted a certification procedure, 26 of these states allow federal district courts to certify questions. Some states also allow for other federal courts. 2/ Montana is one of the courts that would appear to provide a certification procedure for other federal courts, as it

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1/ The following 35 States, as well as Puerto Rico, have adopted a certification procedure: Alabama; Arizona; Colorado; Connecticut; Delaware; Florida; Georgia; Hawaii, Idaho; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Nebraska; New Hampshire; New Mexico; New York; North Dakota; Oklahoma; Oregon; Puerto Rico; Rhode Island; South Carolina; South Dakota; Texas; Washington; West Virginia; Wisconsin; Wyoming. See 17 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4248 n. 20 for listing of state statutes.

2/ Alabama provides for "a court of the United States". Colorado provides for the Claims Court. Michigan and South Carolina provide for any federal court.

provides for a "United States Court." To date the courts which have used the procedure in Montana are federal district courts and the Ninth Circuit Court of Appeals. See Zahrte v. Sturm, 661 F.2d 17 (Mont. 1983), (The issue certified by the Ninth Circuit involved whether the defense of assumption of the risk still exists as a complete bar to plaintiff's recovery in a products liability action); Decker Coal Co. v. Commwealth Edison Co., 714 P.2d 155 (Mont. 1986), (The Ninth Circuit certified question of whether a partnership had the capacity to sue in its own name); Irion v. Glen Falls Insurance Co., 461 P.2d 199 (Mont. 1969), (District Court certified an issue on insurance coverage). Certification was denied in Glen Falls Insurance Co. v. Irion, 474 P.2d 700 (Mont. 1970). The Montana Supreme Court noted that the denial for certification was not because the question was fully answered in an earlier opinion (461 P.2d 199), but that jurisdiction was before the District Court who could properly make the determination.

It is obvious that Montana does not limit certification to courts which have appellate review, and since it did not use the term "court of the United States" as many of the state statutes do, it would appear that the Tax Court could use the procedure. We have been unable to locate any legislative history of the appellate rules which would indicate any legislative intent in the use of the term "United States Court."

The second and third part of the question of whether the certification provision could be used by the Tax Court looks to whether the issue is dispositive of the federal litigation and whether there is doubt as to the Montana law on the issue. Certification is a procedure which is within the discretion of the court asking for it. However, the state supreme courts can also refuse to answer an issue if it is not dispositive of the federal litigation and the supreme court's opinion would be merely advisory. See Boyter v. Commissioner, 668 F.2d 1382, 1385 (4th Cir. 1981); Matter of Certified Question, 549 P.2d 1310 (Wyo. 1976); Ormsbee Development Co. v. Grace, 668 F.2d 1140 (10th Cir. 1982), cert. denied, 459 U.S. 838 (1982).

In Boyter, petitioners obtained a Haitian divorce in December, returned to Maryland and remarried in January. Petitioners did so every year to avoid the marriage tax penalty. The Tax Court held that under Maryland law the migratory divorces were not recognized. Petitioners appealed.

The Fourth Circuit noted that despite the fact that the Tax Court could not use the Maryland certification procedure (only available to Supreme Court, Court of Appeals and district courts), certification would have been inappropriate since it would not have been dispositive of the litigation. The issue of whether Maryland recognizes migratory divorces would not address

the issue of whether the divorces in question were in fact shams. The Court noted that when there is a question of federal law present and undecided, the decision of which may be wholly dispositive of the case, discretion should be exercised not to certify a question of state law.

Certification should only be used when there is doubt as to the local law. The fact that there may be difficulty in ascertaining local law is no excuse for remitting the issue to a state court. It is a procedure which should be utilized with restraint. See Lehman Brothers v. Schein, 416 U.S. 386, 390-391, (1974). "Prudent exercise of the discretion to certify is important. All certifying courts should be keenly aware of their obligation not to abdicate their responsibility to decide issues properly before them." West American Insurance Co. v. Bank of the Isle of Wright, 673 F.Supp. 760, 764 (E.D. Va. 1987).

Other "factors" to be considered in deciding whether to certify include the closeness of the question; the existence of sufficient sources of state law to permit a principled conclusion; the degree to which considerations of comity are relevant; and the practical limitations of the certification process, such as delay inherent in beginning another proceeding. Miller v. N.R.M. Petroleum Corp., 570 F.Supp. 28, 30 (N.D. WVa. 1983) citing Florida ex rel. Shevin v. Exxon Corp. 526 F.2d 266 (5th Cir. 1976), cert. denied 429 U.S. 829 (1976).

In Barnes v. Atlantic & Pacific Lines Ins. Co. of America, 514 F.2d 704 (1975), the Fifth Circuit used the Alabama certification procedure in a published opinion for the first time. The case involved an action to recover proceeds from a life insurance policy. The Court of Appeals noted that these "ordinary, repetitive contract interpretations which because of their recurring nature involving literally hundreds of contracts with many public policy factors affecting the welfare of local citizens, call for unequivocal resolution by the final court." Generally most certified questions deal with insurance statutes, products liability, and other tort law questions. See Estate of Madsen v. Commissioner, 659 F.2d 897 (9th Cir. 1981) (life insurance proceeds, estate taxes, community property); Irion, 461 P.2d 199 (insurance, breach of statutory duty of causing transfer of title). Zahrte, 661 P.2d 17 (products liability); Decker Coal, 714 P.2d 155 (breach of contract, partnership's capacity to sue).

The requirements for certification under Rule 44 of the Montana Rules of Appellate Procedure are: (1) that there is a controlling question of Montana law for which there is a substantial ground for difference of opinion; and (2) the adjudication by the supreme court will materially advance the ultimate termination of the federal litigation. In this case the

issue that would be certified to the Montana Supreme Court is whether a county in Montana must receive fair market value for property upon disposition of special improvement district property. In other words, do the sections of Title 7, Chapter 8 control the provisions of Title 7, Chapter 12. This issue will determine whether the county commissioners had the authority to transfer the property for no money consideration, thereby determining whether the contract was void under Montana law.

However, determination of whether the action of the county commissioners was ultra vires may not be dispositive of the case. If the Montana court holds that the county commissioners could sell the land for no consideration, respondent may argue, even if the transfer was valid under Montana law, that there was no economic substance to the transaction, that it was merely for a tax avoidance purpose, and that [redacted] did not acquire benefits and burdens of ownership.

Furthermore, this issue appears to be one of pure statutory construction upon which there appears to be ample case law. Language of the statute should be construed in accordance with its usual and ordinary acceptance with a view to giving vitality to and making operative all provisions of the law, and to accomplish the intention of the legislature when ascertainable. Burritt v. City of Butte, 508 P.2d 563 (Mont. 1973). In Teamsters, Chauffeurs, Warehousemen and Helpers Local 45 v. Montana Liquor Control Board, 471 P.2d 541, 543-44, (Mont. 1970), the court noted that it is established that if one statute deals with a subject in general and comprehensive terms and another deals with part of the same subject in more minute and definite way, to the extent any necessary repugnancy exists between such statutes, the special statute will prevail. In this case the statutes are not inconsistent, but section 7-8-2211 is more explicit. See also State of Townsend v. Davidson, 531 P.2d 370 (Mont. 1975). The Tax Court should be able to determine which statute controls or if there is any conflict between them. In addition, this type of issue is not one that is generally a recurring issue like insurance, product liability and tort cases, where state courts feel it is important to exercise control.

II. Under what procedures can the Tax Court certify an issue?

The next question to be considered is under what procedures could the Tax Court certify an issue to the state court. To date no issue has been certified by the Tax Court to a state court according to our research. It was considered in Boyter v. Commissioner, 74 T.C. 989 (1980). There is no discussion of the procedures to be used in certifying since Judge Wilbur came to the conclusion that, because there was no Maryland law on the issue of migratory divorces, he could research the issue as well as the state court. On appeal the Fourth Circuit noted that the

Tax Court did not have the option of certifying the issue under the Maryland certification procedures as it was not available under state law. Boyter v. C.I.R., 668 F.2d 1382, 1385, n.3 (4th Cir. 1981). The state procedure in Maryland only allows the following federal courts to certify an issue: the U.S. Supreme Court; a Court of Appeals; and district courts. The Court also noted that certification would not have been appropriate because there was a question of federal law that was present and undecided, the decision of which may be wholly dispositive of the case.

It is clear that the Tax Court has no specific rule for certifying an issue to the state supreme courts; under Tax Court Rule 1 it would appear that a judge could certify an issue if the state court has a provision allowing the procedure. Most of the state certification statutes list the procedures to be followed to get an issue certified. So once the issue of certification is presented to the Tax Court, and if the Tax Court decides on certification, then the procedures listed in the state statute or rule should be followed. In Montana, Rule 44 of the Appellate Procedures, subsection (b) - (h) lists the process to be followed.

III. As a matter of policy, should certification be encouraged?

Finally, as a matter of policy we do not favor certification, unless the law is so unclear or ambiguous on an issue and that issue would be dispositive of the tax litigation. In tax cases, there are often several theories, and the issue to certified may not be dispositive of the entire litigation. The Tax Court has repeatedly decided cases involving state law issues, as numerous areas of tax law are affected by state law (i.e., alimony, divorce, partnership law, insurance, and estate tax). See Smith v. Commissioner, 84 T.C. 889, 896 (1985) (Validity of assumption agreement between petitioner and partnership rests upon state law); Brand v. Commissioner, 81 T.C. 821 (1983) (Whether a limited partner is liable as a general partner is question which must be analyzed under state law); Estate of Meyer v. Commissioner, 66 T.C. 41 (1976) (To determine if any "incidents of ownership" are in life insurance policy at time of death, both terms of policy and state law must be considered); Harold Patz Trust v. Commissioner, 69 T.C. 497 (1977) (Capacity of trustee to litigate is determined by state law); Peters v. Commissioner, 89 T.C. 423 (1987) (Under New York Uniform Commercial Code the petitioners were guarantors and therefore they were not personally liable within the meaning of section 465(b)(2)(A)); Epic Metals Corporation v. Commissioner, T.C. Memo. 1984-322 (When title passes is determined under Pennsylvania law).

It should also be noted that if certification is used, a measure of delay is built into the Tax Court proceeding. Delay is not favored in the Tax Court, particularly since the state law is not dispositive of the litigation.

Finally, the ultra vires actions by the county officials are not the "repetitive," across the board type of action that the state supreme court needs to address, such as insurance or product liability claims which may have an impact on many people.

Should you have any questions regarding this memorandum, please contact Marsha Keyes, Tax Shelter Branch at FTS 566-4174.

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